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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

J.T. WIMSATT CONTRACTING CO., INC.,
et al.,

Plaintiffs and Appellants,

v.

CITY OF SAN DIEGO,

Defendant and Respondent.

TURNER CONTRUCTION COMPANY,

Real Party in Interest and Respondent.

D059276

(Super. Ct. No. 37-2010-00104336)

APPEAL from an order of the Superior Court of San Diego County, Timothy B. Taylor, Judge. Affirmed.

In this case a structural concrete contractor challenges the validity of a "best value" selection process by which contractors for construction of a new main library in San Diego were selected. As we explain, the selection process is authorized by the city's

charter and does not conflict with any statute controlling government contracts in general or the library contract in particular. Accordingly, we affirm the judgment of the trial court denying appellant's petition for a writ of mandate.

FACTUAL AND PROCEDURAL BACKGROUND

On March 19, 2010, appellants J.T. Wimsatt Contracting Co., Inc., and John Wimsatt (collectively Wimsatt) submitted a bid for the structural concrete subcontract on the library to real party in interest and respondent Turner Construction Company (Turner), the designated construction manager for the library project. Thereafter, Turner conducted interviews with each of the eight structural concrete bidders and convened a panel of five reviewers to evaluate the bids on a "best value" scoring basis, as opposed to lowest responsible bid basis. Turner advised all prospective bidders that it would be employing a "best value" scoring process.

Wimsatt's bid was ranked third out of eight and the concrete subcontract was awarded to the first ranked bidder, Morley Construction Company (Morley), on September 9, 2010. Morley began construction on the project site on October 19, 2010.

Wimsatt filed a petition for a writ of mandate in the trial court on November 17, 2010. Wimsatt sought an order directing that respondent City of San Diego (City) and Turner rescind the Morley concrete subcontract and award the subcontract to the lowest responsible bidder. In addition, Wimsatt alleged the Morley subcontract was an unlawful expenditure of funds within the meaning of Code of Civil Procedure section 526a.

The trial court set a hearing on Wimsatt's petition for December 13, 2010. City and Turner filed points and authorities opposing Wimsatt's request for injunctive relief along with declarations, and at the hearing on the petition the trial court denied Wimsatt's request for mandate relief and dismissed its Code of Civil Procedure section 526a claim.

Wimsatt filed a petition for a writ of mandate in this court and we summarily denied the petition. Thereafter, Wimsatt filed a timely notice of appeal from the order denying its petition and dismissing its taxpayer claims.

I

Under the city's best value method of evaluating construction bids, fixed price bids are evaluated on the basis of quantitative nonprice factors, including technical ability, performance history, and proposed staffing. The contract is awarded to the bidder the evaluators determine will provide the best overall value for the city. In its principle argument on appeal, Wimsatt argues Turner and City were barred from using the best value method of awarding the concrete contract by Public Contract Code¹ section 20162² which in general requires that public works contracts be awarded to the lowest responsible bidder.

¹ All further statutory references are to the Public Contract Code unless otherwise indicated.

² Section 20162 states: "When the expenditure required for a public project exceeds five thousand dollars (\$5,000), it shall be contracted for and let to the lowest responsible bidder after notice."

It bears noting that Wimsatt was advised that its bid would be evaluated on a best value basis and that Wimsatt fully participated in the evaluation process without objection. Thus at the outset, Wimsatt's position is not entirely sympathetic. While Wimsatt was willing to compete in the best value process and presumably accept the contract had it been successful, having been unsuccessful, Wimsatt now challenges the validity of the process from which it attempted to benefit.

However, we do not reject Wimsatt's section 20162 argument because we believe it is in any manner estopped to raise it. Rather, we find that section 20162 did not prevent use of a best value method of evaluating the structural concrete bids because section 20162 does not apply to charter cities, such as San Diego.

The mode of contracting work in a city is a municipal rather than a matter of statewide concern and accordingly the statewide bidding procedures set forth in section 20162 and its statutory predecessors have not been applied to charter cities in light of the home rule provisions of article 11, section 5, subdivision (a) of the California Constitution. (*Smith v. City of Riverside* (1973) 34 Cal.App.3d 529, 534; *Piledrivers' Local Union v. City of Santa Monica* (1984) 151 Cal.App.3d 509, 511-512; see also *Mountain View Sch. Dist of Santa Clara v. City Council* (1959) 168 Cal.App.2d 89, 92.)

The fact that the city used funds from the California Reading and Literacy Improvement and Public Library Construction and Renovation Bond Act of 2000 (Ed. Code, § 19985 et seq.) (Bond Act) to finance construction of the library does not make section 20162 applicable to the concrete subcontract. Although the Bond Act requires

that bond funds be awarded under the competitive bid procedures set forth in the Public Contract Code, the Bond Act was not a constitutional amendment. Hence, it should not be interpreted as diminishing the city's important rights under article 11, section 5 of the Constitution. In this regard, we note that the home rule provisions of our Constitution were adopted by the people based on " *'the principle that the municipality itself knew better what it wanted and needed than the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs. . . .'* " (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 395-396.) Article 11, section 5 was placed in the Constitution so that the existing provisions of city charters would not be "frittered away by general laws." (*Id.* at p. 395.)

Given the importance of the home rule provisions of our Constitution, we should interpret the Bond Act in a manner which does not unnecessarily intrude on the prerogatives of charter cities. Thus, like the state librarian,³ we interpret the Bond Act as requiring a charter city to comply with the competitive bid procedures set forth in the Public Contract Code, including section 20162, *only* if there is no superseding provision in the city's charter or ordinances. Here, there are in fact such superseding conflicting city charter and municipal code provisions.

³ In 2002 the State Librarian advised City "the Bond Act requirement that all construction projects must be competitively bid in accordance with the Public Contract Code (Education Code § 19991) would be superceded (sic) by a charter city ordinance that allows design-build strategy for construction of public works projects, including libraries."

By way of a ballot measure adopted in June 2004, city voters approved addition of section 94.4⁴ to the city charter. Section 94.4 permits City to contract for public works through competitive negotiation with a construction manager and gives the city council the power to adopt guidelines governing operation of such construction management contracts. In March 2010, the city council, acting under the power provided by section 94.4 of the charter, adopted an ordinance which expressly permits a construction manager to select contractors on a best value rather than lowest responsible bid basis. (San Diego Mun. Code, § 22.3809.5)

⁴ Section 94.4 of the city's charter states: "Notwithstanding any provisions of this Charter to the contrary, the City is not prohibited from awarding contracts for the construction of public works using a combination of: (1) design review and management services; and (2) construction management services procured from a single person or entity for a guaranteed maximum price pursuant to a process of competitive negotiation, provided the process of competitive negotiation is conducted as may otherwise be required by this Charter or the Municipal Code. The City Council shall establish by ordinance guidelines for the award, use, and evaluation of such construction manager at risk contracts, and may set an amount below which the City Manager may award such contracts."

⁵ San Diego Municipal Code section 22.3809 states: "The City Manager shall provide in the Request for Proposals for construction manager at risk contract services the method by which subcontracts shall be obtained for construction services and the general terms under which the construction shall be performed.

"(a) The construction manager at risk entity shall, as part of a preconstruction services agreement, obtain bids for subcontracts for proposed construction services agreements and at the direction of the City Manager commit in its proposal for a guaranteed maximum price to award all subcontracts according to:

"(1) lowest responsible bid; or

"(2) highest qualifications as proposed by the construction manager at risk entity and agreed to by the City; or

In sum then, as the trial court found, section 20162 did not prevent City and Turner from using a best value method of evaluating the concrete bids and awarding a subcontract.

II

Next, Wimsatt contends Turner's selection as the construction manager was invalid and that Turner's later selection of Morley as the concrete contractor was therefore improper. Again, we find no defect in the manner in which Turner and Morley were selected.

Following a competitive negotiation process, Turner entered into a preconstruction services agreement (PSA) for the library with the San Diego Public Facilities Financing Authority (Authority) in August 2004. Later, in November 2009, the PSA was amended and the scope of Turner's services was expanded by the city council to include

"(3) best value for price and qualifications as proposed by the construction manager at risk and agreed to by the City."

"(b) Except for management and project administration, a construction manager at risk entity shall not perform any construction services with its own forces or the forces of any affiliated entity unless the City Manager expressly allows for self-performance by the construction manager at risk entity in the Request for Qualifications. If the Request for Qualifications indicates that proposals of self-performance of part of the work by a construction manager at risk entity will be acceptable, any subsequent Request for Proposals shall require that all trades proposed to be self-performed by the construction manager at risk entity shall be obtained pursuant to competitive bidding under subsection (a)(1) of this section."(c) All bids for subcontracts in any construction services agreement shall be open and published and provided to the City without reservation or redaction as part of the proposal and negotiation process for any construction services agreement.

"(d) The City may administer bidding itself for any subcontracted work, or direct the bidding procedures to be used by the construction manager at risk entity."

development of a guaranteed maximum price for the library project and the selection of contractors on a best value basis. In March 2010, Turner was given a construction management at risk contract for the library project following adoption by the city council of section 22.3801 et seq. of the municipal code, which provides express guidelines for use of the construction management method of public works contracting.

Although Turner's activities under the PSA predated adoption of San Diego Municipal Code section 22.3801 et seq., at the time the PSA was awarded and amended, the city's municipal code expressly permitted the city council to engage consultants by way of a competitive negotiation process. (San Diego Mun. Code, § 22.3223.) As the trial court found, until Turner was made construction manager under section 22.3801 et seq. of the municipal code, Turner's role under the PSA was plainly that of a consultant to the city. Thus its selection and performance of its duties under the PSA were plainly proper under the city's charter and municipal code.

Wimsatt also challenges Turner's role as construction manager on the grounds Turner's 2010 bid to become construction manager included another entity, JR Construction, in its statement of qualifications. However, the record clearly indicates City accurately interpreted the reference to JR Construction as identifying a selected sub-contractor rather than the responsible financial entity. Thus the reference to JR Construction in no manner prevented Turner from acting as construction manager.

III

Next, Wimsatt argues Turner acted improperly in conducting its evaluation of the eight concrete bids. Wimsatt relies on the fact bidders were given a sample scoring sheet before submitting their proposals and in some respects the actual scoring sheets later used by Turner were different.

As the trial court found, the evaluation process used by Turner was authorized under Turner's construction management contract with City, which in turn was authorized by San Diego Municipal Code section 22.3809. More importantly, the declarations of the Turner employees who conducted the evaluations fully explained the changes to the scoring sheets were entirely stylistic and made in an effort to assist the evaluators in considering all eight bids on a uniform basis. Significantly, the declarations of the Turner employees establish the changes to the scoring sheets were made *before* the evaluation process commenced, all eight bids were measured using the same scoring sheets and none of the value categories by which bids were considered was altered. Given this record, there is no basis upon which to conclude that any unfairness or favoritism undermined the evaluation process.

IV

Because Wimsatt's substantive contentions with respect to the propriety of the bidding process lack merit, there is no basis upon which it was entitled to any relief by way of mandate. Moreover, there is no basis upon which Wimsatt can contend there was

any improper use of taxpayer funds within the meaning of Code of Civil Procedure section 526a. Thus the trial court properly denied Wimsatt's petition for a writ of mandate and dismissed its Code of Civil Procedure section 526a claim.

Under these circumstances, we need not and do not reach Turner and City's alternative contentions that Wimsatt failed to exhaust its administrative remedies and lacks standing under Code of Civil Procedure section 526a; moreover, although discussed by the trial court, we need not consider the practical problems which might arise by virtue of rescinding a construction contract which has been substantially performed.

The order is affirmed. Respondents to recover their costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

McINTYRE, J.

IRION, J.